

in the case quoted by my learned brother, the want of registration is not fatal.

BY THE COURT:—This appeal is allowed in part and the decree of the learned Judge of this Court is modified to this extent that the plaintiffs' claim for the recovery of the amount sued for is maintained but it is ordered that the same would be realisable out of the assets, if any, left by Syed Muhammad Khan, now in the hands of the present contesting defendants. As the appeal has failed substantially, the respondents should get their costs from the appellants who should bear their own costs.

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REVISIONAL CIVIL

Before Justice Sir Charles Kendall

RAGHUBIR DAS (DEFENDANT) v. SITAL PRASAD RAO AND
OTHERS (PLAINTIFFS)*

1935
April, 26

Civil Procedure Code, section 115; order XXIII, rule 1—Withdrawal of suit with liberty to bring fresh suit—Granted by appellate court—Grounds—Revision.

A suit for a declaration relating to certain shops was dismissed on the merits and *inter alia* on the ground of section 42 of the Specific Relief Act. During the course of the appeal the plaintiffs appellants applied for leave to withdraw the suit under order XXIII, rule 1, on the ground that there was a fatal defect, namely the omission to claim an alternative relief in the event of their being found to be out of possession. The appellate court granted the application, but its order did not show any reasons for doing so; it did not even describe what the formal defect was, nor discuss whether it was a fatal defect:

Held, that although the High Court was very reluctant to interfere in revision with orders passed under order XXIII, rule 1, it should interfere where it considers that the lower court has not applied its mind to the matter before it, or, in other words, has not exercised its discretion in a judicial manner; where the court has not observed the rule and has not had before it the considerations by which it ought to be guided in the exercise of its discretion.

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Jhunku Lai v. Bisheshar Das (1), *Chivanji Lal v. Irphan Ali* (2), and *Kali Ram v. Dharman* (3), distinguished.

Mr. *Shiva Prasad Sinha*, for the applicant.

Mr. *Muhammad Ismail*, for the opposite parties.

KENDALL, J. :—This is an application for the revision of an appellate order passed by the Subordinate Judge of Gorakhpur allowing the opposite parties to withdraw their suit under order XXIII, rule 1 of the Code of Civil Procedure. The circumstances briefly are that the plaintiffs had brought a suit for a declaration that they alone were entitled to realise the dues from certain shopkeepers, and they also claimed an injunction against interference with this alleged right. The Munsif after taking all the evidence and hearing arguments dismissed the suit. The plaintiffs appealed, but during the course of the appeal they made an application to be allowed to withdraw the suit on the ground that there was a formal defect, namely that they had not claimed an alternative relief in the event of their being found not to be in possession of the property; and as the trial court had dismissed the suit in accordance with the provisions of section 42 of the Specific Relief Act, this defect was fatal to the suit, and therefore they prayed that they should be allowed to withdraw it with liberty to institute a fresh suit. The appellate court without discussing the merits of the application remarked that there was a patent defect and that the suit might be withdrawn, but directed that costs should be paid to the respondents; and the order which I am asked to revise is a subsequent one passed in the following words: "Costs of both the courts paid to respondent. The plaintiff is allowed to withdraw the suit, with liberty to file a fresh separate suit. Appeal disposed of accordingly."

There can be no doubt that permission was given because the plaintiffs had claimed that the provisions of section 42 of the Specific Relief Act were fatal to the suit as it stood, and although the court has not in so many

(1) (1918) I.L.R., 40 All., 612.

(2) [1935] A.L.J., 277.

(3) [1934] A.L.J., 821.

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words given this as the reason for permitting the suit to be withdrawn, it is argued on behalf of the opposite parties that this undoubtedly was the reason, and that it did amount to a formal defect in the suit as it originally stood. I have been referred to the judgment of the trial court, which has disposed of the plaintiffs' case for a number of reasons and only mentioned section 42 of the Specific Relief Act by the way. There is no issue relating to section 42 of the Act, and it was not by any means the only reason the Munsif had for dismissing the suit.

It is quite clear that the orders passed by the learned Subordinate Judge are defective in that they do not show his reason for allowing the plaintiffs' application. He has not even described what the formal defect was, nor has he discussed the question of whether it was a defect that may be fatal to the suit. All he has done is to remark that there was a "patent" defect.

In support of his order I have been referred to a decision of a Bench of this Court in the case of *Jhurku Lal v. Bisheshar Das* (1), in which it was held that where a court had given leave to the plaintiff to bring a fresh suit, the fact that the court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiff's application was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure. This was followed in the case of *Chiranjil Lal v. Irphan Ali* (2). This latter Bench in following the earlier decision remarked that the earlier Bench had held that even if the court below had exercised a wrong discretion (not merely might have exercised a wrong discretion) in granting leave to withdraw the suit, the case would not come under section 115 of the Civil Procedure Code. In another case, *Kali Ram v. Dharman* (3), another Bench of this Court remarked that where the court had exercised its discretion the order should not be interfered with by the High Court in the

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exercise of its revisional powers. In this case the Bench was clearly of opinion that the lower court had not exercised a proper discretion.

I cannot, however, find in any of these decisions which have been quoted on behalf of the opposite parties that there is any authority for holding that this Court should not interfere if it considers that the lower court has not applied its mind to the matter before it, or in other words, has not exercised its discretion in a judicial manner. In the present case the question before the court was whether the formal defect which undoubtedly existed must necessarily be fatal to the suit. That question, as I have already remarked, the court has not discussed, and does not appear to have considered. There is nothing to show why the plaintiff should not have applied for an amendment of his plaint, as is frequently done in similar suits under the Specific Relief Act. It is true that it was a late stage at which to amend the plaint, because the matter had already come before the appellate court. But the same objection of course applies to an application to withdraw the suit under rule 1 of order XXIII. It may be that the plaintiffs believed that the court would not have granted a prayer for the amendment of the plaint, and the court may also have been of that opinion. But if the question had been discussed and the court had decided that it was too late a stage at which to allow the amendment of the plaint, it would also have had to consider whether it was not too late a stage at which to allow the suit to be withdrawn, and in fact the matter would have been fully discussed and the question of whether rule 1 of order XXIII could be properly applied would have been satisfactorily decided.

The order of the lower appellate court appears to me to be objectionable on two grounds. Firstly, it is in itself defective because it does not disclose that the court has applied its mind to the matter and exercised its discretion judicially, and secondly the order appears to